

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**IN RE REQUEST FOR ADVISORY OPINION  
REGARDING CONSTITUTIONALITY OF  
2005 PA 71**

Supreme Court No. 130589

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**BRIEF OF *AMICI CURIAE***

**LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW**

and

**AARP**

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## STATEMENT OF INTEREST OF *AMICI CURIAE*

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, a past Attorney General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Mississippi, Philadelphia, San Antonio, San Francisco, and Washington, D.C. Through the Lawyers' Committee and its affiliates, thousands of attorneys have represented thousands of clients in civil rights cases across the country challenging discrimination in virtually all aspects of American life.

The Lawyers' Committee has decades of experience litigating individual and class action voting rights claims in federal and state courts, and is highly knowledgeable about the legal and policy issues relevant to this case. For example, the Lawyers' Committee is counsel for the plaintiffs in *Common Cause v Billups*, 406 F Supp 2d 1326 (ND Ga. 2005), where the district court has granted two preliminary injunctions enjoining implementation of Georgia voter photo identification laws enacted in 2005 and 2006. The Lawyers' Committee is also counsel for plaintiffs in *Inter Tribal Council of Arizona, Inc v Brewer*, No. CV06-1362-PCT-JAT (D Ariz, filed May 24, 2006) a federal statutory and constitutional challenge to an Arizona law that requires citizens to provide proof of citizenship when they register to vote and identification when they vote in person.

With the cooperation of other voting rights advocates the Lawyers' Committee has systematically tracked legislation dealing with photo-IDs and provided legal analysis on legislation that would impede equal participation by all in the political process, particularly legislation imposing photo-ID requirements, with successes in Missouri, Minnesota, and

Ohio. These examples are just a part of the Lawyers' Committee's efforts to protect voting rights and promote election reform.

Because of its experience litigating voting rights cases and its familiarity with the constitutional implications of photo-ID laws, the Lawyers' Committee is well-equipped to act as *amicus curiae* in this matter regarding Michigan's photo-ID law.

AARP is a non-partisan, non-profit membership organization dedicated to addressing the needs and interests of Americans age 50+. AARP has more than 36 million members overall and 1.5 million members in Michigan. AARP neither supports nor opposes candidates for public office; nor does it contribute money to political candidates' campaigns or to political parties. AARP favors fair and simple procedures that encourage maximum participation in the electoral process. AARP also supports procedures to detect and prevent voter fraud that do not reflect partisan bias, and that do not permit arbitrary or discriminatory reviews or ID challenges that may discourage voter registration or turnout. Based on these principles, AARP attorneys have participated as co-counsel in federal litigation in Georgia and Arizona challenging state photo ID laws that threaten to reduce, rather than encourage, citizen participation—and particularly participation of older voters and voters with disabilities—in the electoral process. *See Common Cause v Billups*, No. 4:05-CV-0201-HLM (ND Ga); *Inter Tribal Council of Arizona, Inc v Brewer*, No. 3:06-cv-1362 (D Ariz). In addition, in recent years, AARP has participated as *amicus curiae* in several electoral reform cases in the United States Supreme Court. *See, e.g., McConnell v FEC*, 540 US 93; 124 S Ct 619; 157 L Ed 2d 491 (2003); *Randall v Sorrell*, 126 S Ct 2479 (2006).

## **JURISDICTION**

Jurisdiction is conferred on this Court pursuant to article 3, section 8 of the Michigan constitution, which states: “[E]ither house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.” Const 1963, art 3, § 8. In this case, the House requested the opinion of the Michigan Supreme Court as to the constitutionality of Section 523 of 2005 PA 71, MCL 168.523. This legislation was enacted on July 14, 2005, and will be effective on January 1, 2007. Therefore, the Michigan Supreme Court has jurisdiction to issue an advisory opinion as to the constitutionality of this legislation.

## **QUESTION PRESENTED**

- I. Do the photo identification requirements of Section 523 of 2005 PA 71, MCL 168.523, on their face, violate either the Michigan Constitution or the United States Constitution?

*Amici curiae* answer “Yes.” The photo identification requirements, on their face, violate the Michigan Constitution and the United States Constitution.



## SUMMARY OF ARGUMENT

*Amici curiae* ask the Court to find the Michigan photo-ID requirements in violation of the fundamental right to vote, as established under article 2, section 1 of the Michigan constitution and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Michigan's photographic identification (photo-ID) requirements impose multiple undue burdens on the estimated 370,000 Michigan voters without photo-ID. First, the requirements place significant monetary and logistical burdens on voters. Also, these requirements explicitly invite challenges to ballots cast by voters without a photo-ID. This creates a substantial likelihood that many ballots cast by voters without photo-ID will not be counted. This subjects voters without photo-ID to harsher scrutiny than voters with photo-ID, and thus classifies some voters differently from other voters. These undue burdens will disproportionately affect Michigan's elderly, disabled, poor, and minority voters. Because of these undue burdens, Michigan's photo-ID requirements must be subjected to strict legal scrutiny under Michigan and federal constitutional law.

Under strict scrutiny analysis, Michigan's requirements are *not* narrowly tailored to meet the State's stated compelling interest of preventing voter fraud. When drafting the new requirements, the Michigan Legislature did not rely on any evidence of any documented instances or even allegations of in-person voting irregularities in Michigan. The few alleged voting irregularities concern absentee ballots and voter registration. In contrast, Michigan's photo-ID requirements would prevent voter impersonation at the polls, for which there have been no allegations before the Legislature. Moreover, Michigan has a number of existing election laws that criminalize election fraud. As a result, the photo-ID requirements are unnecessary, let alone the *least* restrictive means of preventing voter fraud. Therefore,

Michigan's photo-ID requirements cannot survive strict scrutiny and thus violate the Michigan constitution and the United States Constitution.

## **PROCEDURAL HISTORY**

In 1996 and again in 2005, the Michigan Legislature enacted laws that require voters to show photographic identification (photo-ID) before voting.<sup>1</sup> Before the passage of these laws, Michigan voters were only required to provide a signature and address to election elections officials. 1995 PA 87, MCL 168.523.<sup>2</sup> The laws of both 1996 and 2005 are similar and state in relevant part:

[a]t each election, before being given a ballot, each registered elector offering to vote shall identify himself or herself by presenting an official state identification card issued to that individual pursuant to Act No. 222 of the Public Acts of 1972, being sections 28.291 to 28.295 of the Michigan Compiled Laws, an operator's or chauffeur's license issued to that individual pursuant to the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, or other generally recognized picture identification card and by executing an application showing his or her signature or mark and address of residence in the presence of an election official. . . . However, an elector being allowed to vote without the identification required under this subsection *is subject to challenge* as provided in section 727.

1996 PA 583, MCL 168.523(emphasis added).<sup>3</sup>

The photo-ID requirements enacted in 1996 were never implemented after the Michigan Attorney General at the time, Frank Kelley, issued an opinion finding that the law violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. OAG, 1997, No. 6930 (Jan. 29, 1997).<sup>4</sup> Kelley concluded that the Legislature's stated reason for the law rendered it redundant, noting that there were numerous statutory

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<sup>1</sup> The most recent enactment of this law is scheduled to go into effect on January 1, 2007. See 2005 PA 71, MCL 168.123.

<sup>2</sup> Some precincts required that voters also provide a date of birth.

<sup>3</sup> The law is silent on whether this photo-ID requirement applies to voters who vote by absentee ballot.

<sup>4</sup> The Attorney General is obligated by statute to render opinions interpreting the law at the request of state agencies or officials." 1970 CL 14.32

provisions that protected the integrity of elections and against voter fraud.<sup>5</sup> As such, the photo-ID requirements were not the least restrictive means of preventing voter fraud and were therefore unconstitutional. Because the Attorney General's opinions are binding on the agency that requested them, the law was never implemented. *See Campbell v Patterson*, 724 F2d 41, 43 (CA 6, 1983); *Michigan Beer & Wine Wholesalers Ass'n v Attorney General*, 142 Mich App 294, 300; 370 NW2d 328 (1985).

It is worth noting that Kelley pointed out that these photo-ID requirements would particularly disadvantage “the poor, those who do not drive, especially the elderly, the handicapped and those, who for whatever reason, do not possess a picture identification card, this requirement imposes economic and logistical burdens.” OAG, 1997, No. 6930 (Jan. 29, 1997). Furthermore, Kelley noted that because there was a lack of voter fraud problems in Michigan, the photo-ID or affidavit requirements were “simply not necessary to promote a compelling governmental interest.” OAG, 1997, No. 6930 (Jan. 29, 1997).

Ignoring the Attorney General opinion regarding the unconstitutionality of these photo-ID requirements, Michigan reenacted the photo-ID requirements, including an affidavit requirement for those without such identification. However, this affidavit requirement appears to extend the challenge provisions of the Michigan Code to include voters who cast a ballot without showing photo-ID to the election inspector. Without this addition, Michigan law allows challenges only under particularized circumstances:

An election inspector shall challenge an applicant applying for a ballot if the inspector knows or has reason to suspect that the applicant is not a registered elector or the precinct, or if a challenge appears in connection with the applicant's name in

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<sup>5</sup> *See e.g.*, 2004 PA 92, MCL 168.499(3); 1996 PA 583, MCL 168.931; 1995 PA 261, MCL 168.932; 1995 PA 261, MCL 168.932a; 2004 PA 92, MCL 168.727. Specifically, section 932a of the Michigan Election Law imposes civil and criminal penalties on persons who vote or attempt to vote while impersonating another person, vote under a false name, attempt to vote when not qualified to vote, attempt to vote in a precinct where they do not reside, and vote or attempt to vote more than once in the same election. *See* 1995 PA 261, MCL 168.932a.

the registration book. A registered elector of the precinct of the precinct present in the polling place may challenge the right of anyone attempting to vote if the elector knows or has reason to suspect that individual is not a registered elector in that precinct. An election inspector or other qualified challenger may challenge the right of an individual attempting to vote who has previously applied for an absent voter ballot and who on election day is claiming to have never receive the absent voter ballot or to have lost or destroyed the absent voter ballot.

2005 PA 71, MCL 168.727.

## ANALYSIS

### 1. Michigan's Photo-ID Law is Subject to Strict Scrutiny.

In analyzing Michigan's photo-ID law under both the Michigan and United States Constitutions, this Court should apply strict scrutiny because the photo-ID requirements impose an undue burden on the fundamental rights of eligible citizens to cast a meaningful ballot. The photo-ID law fails under this standard of review. The photo-ID requirements do not advance a compelling government interest nor are they narrowly tailored to protect the constitutional rights of Michigan's citizens. Indeed, the photo-ID law cannot be justified under a "reasonable, non-discriminatory" standard of review.

Both this Court and the U.S. Supreme Court have made clear that voting is a fundamental constitutional right. Construing the due process and equal protection clauses of the Michigan constitution, Const 1963, art 1 § 2, this Court observed that "[i]t can be stated without exaggeration that the right to vote is one of the most precious, if not the most precious, of all our constitutional rights." *Wilkins v Bentley*, 385 Mich 670, 680; 189 NW2d 423, 427 (Mich. 1971). As the Supreme Court stated in *Reynolds v Sims*, the "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," and thus, "any alleged infringement of the rights of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v Sims*, 377 US 533, 561-62; 84 S Ct 1362, 12 L Ed 2d 506 (1964).

Although the U.S. Constitution allows states to establish the time, place and manner of elections for Senators and Representatives, US Const, art I, § 4, cl 1, such regulations cannot unduly burden or abridge the right to vote. *Tashjian v Republican Party*, 479 US 208, 217; 107 S Ct 544; 93 L Ed 2d 514 (1986) (“The power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote.”).

Given the fundamental constitutional right at issue, this Court in construing the Michigan constitution in past cases has applied a higher standard of review to election laws, which impair voters’ rights, requiring a showing that the election law is necessary to further a compelling interest. *Wilkins, supra* at 680 (Michigan election law that establishes different residency requirements for students violated Michigan and U.S. Constitutions); *Mich State UAW Community Action Program Council v Secretary of State*, 387 Mich 506; 198 NW2d 385 (1972) (election law relating to removal of voters violated Michigan constitution where state failed to demonstrate a compelling interest); *Arlee v Lucas*, 55 Mich App 340; 222 NW2d 233 (1974).

In *Burdick v Takushi*, the Supreme Court clarified the analysis a court must undertake when considering a challenge to a state election law under the Fourteenth Amendment to the U.S. Constitution. 504 US 428, 433; 112 S Ct 2059; 119 L Ed 2d 245 (1992). In this context, a court must do two things: First, the court must determine the “*rigorousness of [its] inquiry*” by examining “the extent to which a challenged regulation burdens . . . Fourteenth Amendment rights.” *Id.* at 434 (emphasis added). If the regulation is a “severe restriction[,]” the regulation must be “narrowly drawn to advance a state interest of compelling importance.” *Id.* (citations omitted). If the burdens are not severe, the Court will assess whether the challenged regulation is “reasonable” and “nondiscriminatory.” *Id.* (citations and internal quotations omitted). Second, the court then must *conduct a balancing*

*test applying the appropriate level of inquiry*; specifically, the court must “weigh the character and magnitude of the asserted injury to the rights protected by the . . . Fourteenth Amendment that the plaintiff seeks to vindicate” against the “precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* (citations and internal quotations omitted).

The Court should apply a strict and rigorous scrutiny to the photo-ID law at issue given the severe restrictions on citizens’ fundamental right to vote.

## **2. Michigan’s Photo-ID law Imposes Undue Burdens on Voters.**

To determine the level of scrutiny used to review the constitutionality of a law that affects the right to vote, a court first must determine if the statute imposes an undue burden on that fundamental right. *Dunn v Blumstein*, 405 US 330, 342-43; 92 S Ct 995; 31 L Ed 2d 274 (1972). A statute is an undue burden if it has the potential to bar eligible voters from voting.<sup>6</sup> *See Burdick, supra* at 434. The photo ID requirements place an undue burden on eligible Michigan voters because it will bar eligible Michiganders from voting. *See id.*

If the photo-ID requirements were implemented, countless eligible Michigan voters could be disfranchised. According to the Michigan Secretary of State’s office, as many as

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<sup>6</sup> Michigan courts only require a statute impose a burden on the fundamental right to vote in order to review a statute using strict scrutiny. *See Austin, supra*, at 514; *Wilkins, supra* at 684. The following discussion demonstrates that the photo-ID requirements impose an undue burden on the fundamental right of all eligible Michigan voters to cast a meaningful ballot. Therefore, under both Article 2, Section 1 of the Michigan Constitution and under the Section 1 of the 14<sup>th</sup> amendment to the United States Constitution, the photo-ID requirements should be reviewed using strict scrutiny. Unlike under the United States Constitution, in Michigan a court will impose strict scrutiny even when a statute imposes a burden that does not have the potential to prevent eligible voters from casting a ballot. For instance, in *Wilkins*, this Court applied strict scrutiny to election laws that imposed different requirements on student voters than on other voters. *Wilkins, supra* at 684. In *Wilkins*, this Court recognized that “. . . it is not mandatory that these plaintiffs demonstrate an absolute denial of the right to vote in order to require the State to show a compelling interest. Plaintiffs need only show that a burden has been placed on this precious right in order to avail themselves of the Equal Protection Clause.” *Id.*

370,000 Michigan voters who are on the registration roles do not have a driver's license or state-issued ID card.<sup>7</sup> Although the photo-ID requirement does not limit the type of acceptable ID to a driver's license or state-issued ID card, these are by far the most common forms of photo-ID available in Michigan. Moreover, many of the other enumerated forms of acceptable photo-ID—for example, an operator's or chauffeur's license—require voters to have a valid driver's license.

This is not just a reality in Michigan. Nationwide, requiring photo-ID as a prerequisite for eligible voters to exercise the fundamental right to cast a ballot will disfranchise wide swaths of the electorate. The Georgia Secretary of State found that 700,000 eligible Georgians do not have government issued photo-ID.<sup>8</sup> Nationwide, the Department of Transportation estimates that between 6-12% of voters do not have government issued photo-ID.<sup>9</sup>

Alleviating the burden is cumbersome and costly. For most Michigan voters, a state-issued personal identification card costs \$10.<sup>10</sup> Obtaining a driver's license is even more expensive. An original license costs \$25. Michigan drivers must then pay \$18 to renew a

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<sup>7</sup> See Dawson Bell, *Court Jumps Into Dispute Over voter ID Checks*, THE DETROIT FREE PRESS, April 27, 2006, available at [www.freep.com](http://www.freep.com). Such initial estimates have at times undercounted the number of voters affected. For instance, after performing a detailed analysis of its databases, the Georgia Secretary of State found that 700,000 voters do not obtain photo-IDs. See Georgia Secretary of State Cathy Cox, *Analysis of State Databases Reveals Nearly 700,000 Registered Voters Lack Valid Driver's License or State-Issued Georgia ID* (June 19, 2006). This number was more than four times greater than the initial estimate of voters affected.

<sup>8</sup> Georgia Secretary of State Cathy Cox, *Analysis of State Databases Reveals Nearly 700,000 Registered Voters Lack Valid Driver's License or State-Issued Georgia ID* (June 19, 2006).

<sup>9</sup> *Id.*

<sup>10</sup> The fee is waived for certain citizens, including those over 65 and some people with disabilities. See State of Michigan, Personal Identification Card Fees, available at [http://www.michigan.gov/sos/0,1607,7-127-1627\\_8668-76061--,00.html](http://www.michigan.gov/sos/0,1607,7-127-1627_8668-76061--,00.html).

license, \$9 to correct a problem with a license, and \$7 for late renewal fee.<sup>11</sup> Obtaining a license is even more expensive and troublesome for those who do not currently have one. To get a driver's license in Michigan, a citizen must present a birth certificate issued by a governmental unit with a raised seal or a true copy (hospital certificates are not acceptable); a photo US military ID; a photo US military dependant ID; an out-of-state driver license or ID card with photo, a United States passport; or if the voter is born in a foreign country, a certificate of United States naturalization or a certificate of United States citizenship. In addition to one of these forms of identification, an applicant for a driver's license must also provide additional forms of underlying documentation to be eligible for a Michigan driver's license.<sup>12</sup> These pieces of documentations carry an additional cost for the voter. For example, in Michigan a copy of an official birth record is \$26.<sup>13</sup>

These costs will disproportionately disfranchise voters in poor communities. This will compound the fact that voters in traditionally disfranchised communities are already disfranchised in far greater numbers than other voters. The University of Wisconsin—Milwaukee found that nearly 50% of African American and Latino men in Milwaukee do not have valid photo identification. Also in Wisconsin, approximately 23% of persons aged

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<sup>11</sup> State of Michigan, Driver's License Fees <<http://www.michigan.gov/sos/0,1607,7-127-1627-75447--,00.html>> (last accessed July 19, 2006).

<sup>12</sup> See Michigan Department of State, Identification Requirements for an Original Driver License or Personal Identification Card <[http://www.michigan.gov/documents/DE40\\_032001\\_20459\\_7.pdf](http://www.michigan.gov/documents/DE40_032001_20459_7.pdf)>.

<sup>13</sup> State of Michigan, Michigan Birth Record: Application for a Certified Copy <[http://www.michigan.gov/documents/birthapp\\_6360\\_7.PDF](http://www.michigan.gov/documents/birthapp_6360_7.PDF)>.



65 and older do not have driver's licenses or photo-ID.<sup>14</sup> According to the Georgia chapter of the AARP, 36 percent of Georgians over age 75 do not have a driver's license.<sup>15</sup>

Voters subject to a photo-ID requirement are also subject to disfranchisement because of the widely subjective implementation of photo-ID requirements.. For example, deciding whether a voter matches or does not match the photo in an ID card—which can often be many years old—is a very subjective process and easily prone to mistakes. Photo-ID requirements have resulted in improper requests for identification from Asian Americans attempting to vote in 2004. The Asian American Legal Defense and Education Fund (AALDEF) reports that in those elections, “[p]oll workers made improper or excessive demands for identification—often only from Asian American—and misapplied HAVA’s ID requirements.”<sup>16</sup> For example, in each of three states surveyed by AALDEF, roughly a quarter of all Asian American voters surveyed had to show ID, even though many of them were not required to.<sup>17</sup>

### **3. The Photo ID Law’s Affidavit Requirement Imposes Undue Burdens on Michigan Voters.**

The photo-ID requirement provides that voters who do not possess a photo ID may still vote after signing an affidavit that the voter does not have the identification required by the provision; however, “an elector being allowed to vote without the identification required . . . is subject to challenge as provided in section 727.” 2005 PA 71, MCL 168.523. Section 727 dictates the process for challenging voters. 2004 PA 92, MCL 168.727. The

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<sup>14</sup> John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* 1, 11 (June 2005), available at <<http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf>>.

<sup>15</sup> See Deanna Wrenn, *Three States Debate Requiring Voters to Show ID*, Ventura County Star, Mar. 31, 2005, at 6.

<sup>16</sup> Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2004 Elections* 3 (2005), available at <[http://www.aaldef.org/images/2005-08-18\\_ElectionReport.pdf](http://www.aaldef.org/images/2005-08-18_ElectionReport.pdf)>.

<sup>17</sup> *Id.* at 19.

statute requires that an election inspector challenge a voter if the inspector knows or has good reason to suspect that the applicant is not a qualified and registered elector. *Id.* Rules of statutory construction suggest that the confluence of MCL 168.727 and the photo ID requirements potentially create a new basis for challenge. *See* 2004 PA 92, MCL 168.727; 2005 PA 71, MCL 168.523. Challenged voters are subject to an arbitrary and untrustworthy process. 1970 CL 168.729.<sup>18</sup> Because of the non-uniformity of the challenge process, challenged voters are more likely to be disfranchised than those who are not. Thus, eligible Michiganders still suffer an undue burden on the right to vote, despite the affidavit provision.

There is a judicially recognized principle in statutory interpretation that acknowledges the importance and relevance of every word within a statute. The Michigan courts have recognized that “[S]tatutory construction should attempt to give effect to every clause and word of a statute. . . . Also, words in a statute should not be construed in the void, but should be read together to harmonize the meaning, *giving effect to the Act as a whole.*” *General Motors Corp. v Erves*, 399 Mich 241, 254-55; 249 NW2d 41 (1976) (emphasis added).

Adherence to this jurisprudential rule would require that the language in the photo-ID requirements referring to the ability to challenge add some element to Michigan’s voter challenge requirements beyond what is contained in MCL 168.727. *See id.* A logical conclusion may require that voters who show up without photo-ID and attempt to vote through the affidavit process are more susceptible to being disfranchised than a voter who

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<sup>18</sup> “If any person attempting to vote shall be challenged as unqualified, he shall be sworn by 1 of the inspectors of election to truthfully answer all questions asked him concerning his qualifications as an elector and any inspector or qualified elector at the poll may question said person as to such qualifications. If the answer to such questions show that said person is a qualified elector in that precinct, he shall be entitled to receive a ballot and vote. Should the answers show that said person is not a qualified elector at that poll, he shall not be entitled to receive a ballot and vote. If any one of his answers concerning a material matter shall not be true, he shall, upon conviction, be deemed guilty of perjury.” 1970 CL 168.729.

has photo-ID because that voter will be subjected to an untrustworthy challenging process because a lack of photo-ID is a new, independent ground for challenge. Currently, inspectors must only challenge those voters who the inspector knows, or has good reason to suspect, is not a qualified elector. The language of the photo-ID requirements will likely eviscerate the knowledge requirement that serves to protect eligible voters from arbitrary and potentially discriminatory challenges. Under this new process, a voter can be challenged just because he or she does not have photo-ID, regardless of whether there is any knowledge or good reason to suspect that the voter is ineligible to cast a ballot.

The negative impact this will have on voters without ID is amplified by Michigan's current voter challenge structure. Once a voter is challenged, he or she is subject to an arbitrary process that may lead to disfranchisement. According to 1970 CL 168.729, an inspector of election seems to have broad discretion in resolving challenges. *See id.* Michigan's challenge structure places an inordinate amount of discretion in the hands of overworked poll workers. *See id.* Election inspectors in Michigan are required to attend only one training session, called election school, every two years. 1970 CL 168.683. During that singular event, inspectors are trained on all of their responsibilities as inspectors and all of the nuances of Michigan election law.<sup>19</sup> . *See* 1970 CL 168.678. Pursuant to the Michigan code, election inspectors "shall possess full authority to maintain peace, regularity and order at its polling place, and to enforce obedience to their lawful commands during any primary or election . . . ." *Id.* The authority granted to election inspectors to use their discretion to implement election laws is, therefore, very broad. That authority, coupled with the discretion to challenge granted by the confluence of the photo ID provisions and 1970 CL 168.729 makes an eligible voter's right to vote contingent on the decisions of a government

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<sup>19</sup> *See* State of Michigan, Appointing Election Inspectors, *available at* [http://www.michigan.gov/documents/Appointing\\_and\\_Training\\_Election\\_Inspectors\\_42730\\_7.pdf](http://www.michigan.gov/documents/Appointing_and_Training_Election_Inspectors_42730_7.pdf); *see also* 1970 CL 168.683.

actor who is trained only once every two years and may work only one day a year. *See* 1997 PA 158, MCL 168.677. This structure imposes an undue burden on eligible Michigan citizens because it has the potential to bar eligible voters from voting. *See Burdick, supra* at 434.

#### **4. Michigan’s Photo-ID Law Does Not Survive Strict Scrutiny.**

Under the analytical framework established in *Burdick*, the Court must weigh the burdens imposed on voters by the photo-ID law against the “precise interests put forward by the State.” *Anderson, supra* at 789. As the Supreme Court recognized long ago, a posited state interest such as “purity of the ballot box” may be “formidable-sounding,” *Dunn v Blumstein*, 405 US 330, 345; 92 S Ct 995; 31 L Ed 2d 274 (1972), but the inquiry hardly ends there. The purported state interest cannot be analyzed in a vacuum.

Here, there is little, if any, support the state’s rhetorical justifications premised on the purity of the ballot box. When Michigan Attorney General Frank Kelley reviewed the photo-ID requirements at issue in 1997, he found no evidence of voter fraud justifying the law. *See* OAG, 1997, No. 6930 (Jan. 29, 1997). Attorney General Kelley specifically noted, “I am not aware of any substantial voter fraud in Michigan’s elections. I have not received any complaints regarding voter fraud. Moreover, the state’s chief elections official . . . confirmed the fact that Michigan does not have a voter fraud problem.” *Id.* He further noted that “Michigan has numerous statutory provisions in place to protect the integrity of the election process and to protect against voter fraud.” *Id.* Attorney General Kelley concluded that “the picture identification or affidavit execution requirement for voting . . . is simply not necessary to promote a compelling governmental interest.” *Id.* We submit that, in 2006 as in 1997, there is no indication whatsoever of repeated incidents of fraudulent impersonation of a voter as the state alleges, and that no compelling interest is served by the photo-ID requirements.

When a court applies strict scrutiny to classifications of individuals in equal protection analysis, it will strike down the classifications unless they are “narrowly tailored measures that further compelling governmental interests.” *Adarand Constructors, Inc v Peña*, 515 US 200, 227; 115 S Ct 2097; 132 L Ed 2d 158 (1995). But in pursuing such interests,

the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with “precision” . . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’

*Dunn v Blumstein*, 405 US 330; 92 S Ct 995; 31 L Ed 2d 274 (1972) (citations omitted).

Prevention of election fraud is certainly a compelling state interest, *see Burson v Freeman*, 504 US 191, 198-200, 112 S Ct 1846, 119 L Ed 2d 5 (1992), but if this is the legislature’s interest, it already has more narrowly tailored and “less drastic means.” *Shelton v Tucker*, 364 US 479, 488; 81 S Ct 247, 252, 5 L Ed 2d 231 (1960). Therefore, the photo-ID requirements of Section 168.523 cannot withstand strict scrutiny.

**A. There Is No Evidence or Legislative History Indicating Voter Fraud Is a Problem in Michigan.**

Based on what was before the legislature, there appear to be no actual problems of voter fraud in Michigan, and legislative history, combined with other available evidence, suggests that Michigan’s photo-ID requirements could not, therefore, have been aimed at voter fraud. The contemporaneous legislative history of the 1996 legislation does not appear to mention *why* the state Legislature established photo-ID requirements, though ten years later the Legislature stated that the purpose was to prevent voter fraud.<sup>20</sup> Like the legislative history

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<sup>20</sup> Ten years later, when the Michigan legislature reenacted the statute, it stated that the Michigan Legislature amended the Michigan Election Law in 1996 to include this photo-ID requirement as an “effort to safeguard the sanctity of our elections.” 2006 Journal of the House 17. In 1997, Michigan Attorney General Frank Kelley explained that “the governmental interest to be served here [in enacting these photo-ID requirements] is the prevention of voter fraud.” OAG, 1997, No 6930 (Jan. 29, 1997).

of the 1996 enactment, the legislative history of the 2005 reenactment also failed to discuss in any detail *why* the Michigan Legislature embraced photo-ID requirements. *See* 2005 Journal of the House 63; 2005 Journal of the Senate 74; 2005 Journal of the Senate 642. Instead, the Michigan Legislature explained that it reenacted 1996 photo-ID requirements to follow similar steps taken elsewhere. *See* 2006 Journal of the House 17 (“[I]n the past few years, many states, complying with HAVA, have enacted legislation to require stronger voter identification procedures. In 2005, Michigan enacted Senate Bill No. 513 into law as 2005 PA 71 and reenacted the photo identification.”). However, under the Help America Vote Act (HAVA), a first time voter registering by mail cannot vote unless he or she:

- (I) presents to the appropriate State or local election official a current and valid photo identification; *or*
- (II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter

42 U.S.C.A. § 15483(b)(2) (emphasis added). Therefore, HAVA only requires *first time* voters registering by mail to present a form of identification. Furthermore, this identification is *not* required to be a photo-ID. Thus, Michigan’s photo-ID requirements provide requirements *in addition* to those that HAVA requires.

Although the existence of fraud has been implied, no member of the legislature appears to have offered any evidence of it. House Majority Floor Leader Chris Ward reportedly stated a rationale identical to that articulated in support of the 1996 version, saying that the photo-ID requirements were “the most effective thing we can do to fight election fraud . . . and give citizens confidence that elections are fair and open and untainted.”<sup>21</sup>

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<sup>21</sup> Dawson Bell, *Requiring a Photo Could Be Unlawful*, Detroit Free Press, Apr. 27, 2006, available at < <http://www.ac4vr.com/app/content.asp?contentid=826> > (last accessed July 19, 2006).

References to alleged voter irregularities in Michigan surfaced only *after* the reenactment of this legislation, and were unrelated to the measures taken by the legislature in 2005 PA 71. For instance, State Representative Ward reportedly pointed to examples of voter fraud in Michigan by referring to “a Benton Harbor vote-buying scheme, absentee ballot tampering in River Rouge, and election fraud in Ecorse.”<sup>22</sup> All of these instances involved allegations of voter fraud with regard to absentee ballots or using money to obtain votes, not with fraudulent impersonation of a voter.<sup>23</sup>

Although there appear to be a few allegations of voter fraud or irregularities in Michigan, these allegations almost exclusively pertain to voter registration and to absentee ballots—alleged problems that would not be remedied by photo-ID requirements regulating in-person voting.

**B. The Photo-ID Requirements Are Wholly Unnecessary Because Michigan Already Has Ample Statutory Provisions to Prevent Voter Fraud, As This Court Has Recognized.**

Even if fraud were a problem, the state already has statutes that address any problems of fraud—statutes that may already stop some qualified voters from exercising their voting rights—and this Court has recognized that these statutes serve the compelling interest of fraud sufficiently well. *Michigan State UAW Community Action Program Council v Austin*, 387 Mich. 506; 198 NW2d 385 (1972). In *Austin*, this Court found that an election law that removed qualified voters from voter rolls if they failed to vote within two years was not narrowly tailored to meet the state’s compelling interest of preventing voter fraud. *Austin*,

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<sup>22</sup> *Former AG Says Requiring ID Hurts Vote Rights*, Lansing State J, Nov. 24, 2005, at <<http://www.lsj.com/apps/pbcs.dll/article?AID=/20051124/NEWS01/511240342/1001/NEWS>> (last accessed July 19, 2006).

<sup>23</sup> *See* State of Michigan, Department of Attorney General, *Cox Charges Four with Election Violations*, Jan. 7, 2003, available at <[http://www.michigan.gov/printerFriendly/0,1687,7-164-34739\\_34811-58997--,00.html](http://www.michigan.gov/printerFriendly/0,1687,7-164-34739_34811-58997--,00.html)> (last accessed July 19, 2006) (discussing felony charges in Ecorse, Michigan against four people “accused of handling and tampering with absentee ballots in the City of Ecorse.”).

*supra* at 520. Although the Court recognized that the voter removal law did “to some extent accomplish” the purpose of preventing voter fraud, it was “not sufficient to demonstrate a compelling interest.” *Id.* at 517. More importantly for analysis of Michigan’s photo-ID requirements, the Court pointed to the state’s election laws that criminalize voter fraud and that serve as “a *comprehensive* set of safeguards to prevent fraudulent voting.” *Id.* (emphasis added). This Court ultimately concluded that “these laws might in themselves be sufficient to rebut defendant’s assertions that MCLA s 168.509 is necessary to prevent fraud.” *Id.* at 519; *see also Wilkins, supra* at 687 (citing Michigan election laws that criminalize voter fraud to support its finding that the student residency requirements were not narrowly tailored to meet the state’s compelling interest of preventing voter fraud). This Court viewed the state’s existing laws preventing voter fraud as being comprehensive, thus the state’s enacting a photo-ID law to prevent fraud is unnecessary and contravenes that determination.

As this Court has said, the Michigan Election Law contains a “comprehensive set” of criminal penalties for committing voter fraud. *See e.g.*, 2004 PA 92, MCL 168.727; 2004 PA 92, MCL 168.499(3); 1996 PA 583, MCL 168.931; 1995 PA 261, MCL 168.932; 1995 PA 261, MCL 168.932a. Specifically, section 932a of the Michigan Election Law imposes civil and criminal penalties on persons who vote or attempt to vote while impersonating another person, vote under a false name, attempt to vote when not qualified to vote, attempt to vote in a precinct where they do not reside, and vote or attempt to vote more than once in the same election. *See* 1995 PA 261, MCL 168.932a. These sanctions pertain directly to voter impersonation and other voter fraud that concerns *in-person* voters. The types of voter fraud that this section prevents are the *same* types of voter fraud that these photo-ID requirements were enacted to prevent. Moreover, the current law successfully combats the type of fraud that forms the legislative rationale for the photo ID requirement without removing eligible voters from the process. As discussed above, the photo ID requirement



will be unsuccessful in preventing the type of election fraud that is a concern of the legislature, but will disfranchise countless eligible voters. It is clear from this Court's decisions that what is needed to decrease the likelihood of voter fraud is better enforcement of existing laws aimed at directly preventing voter fraud and not new laws that unduly burden voters but do nothing to prevent the types of fraud that actually occurs in Michigan.

Here, not only are documented instances and allegations of voter fraud uncommon in Michigan, but this photo-ID law will not even prevent the type of voter fraud that allegedly occurred in Michigan. The alleged voting problems in Michigan involve absentee ballots and voter registration.<sup>24</sup> Because the photo-ID requirements only pertain to in-person voters, the photo-ID requirements do *not* apply to absentee voters and to voter registration – which are the predominant areas with alleged voting problems.

The Michigan Election Law already contains provisions that are narrowly tailored to prevent voter fraud, and while these provisions may disfranchise a number of potential legal voters, the proposed photo-ID requirements would disfranchise even more legal voters, and therefore do *not* constitute the least restrictive means of preventing voter fraud.

#### **5. Michigan's Photo-ID Law Does Not Withstand a Reasonableness Standard of Review.**

Even if, *arguendo*, the less exigent standard of reasonableness is the more appropriate standard for review of the amended Section 168.523, the photo-ID requirements of the revised statute should still be struck down because they are unreasonable.

The right to vote is a fundamental right. *See Anderson v Celebrezze*, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983); *Reynolds v Sims*, 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964); *Wesberry v Sanders*, 376 US 1, 17-18; 84 S Ct 526; 11 L Ed 2d 481 (1964) (“No right is more precious in a free country than that of having a voice in the election of those

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<sup>24</sup> *See Former AG Says Requiring ID Hurts Vote Rights, supra*; State of Michigan, Department of Attorney General, *supra*.

who make the laws under which, as good citizens, we must live. . . . Our Constitution makes no room for classification of people in a way that unnecessarily abridges this right.”). The United States Supreme Court has reaffirmed several times the existence of “a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v Blumstein*, 405 US 330, 336; 92 S Ct 995; 31 L Ed 2d 274 (1972); *see also Harper v Va State Bd Of Elections*, 383 U.S. 663, 665; 86 S Ct 1079; 16 L Ed 2d 169 (1966).

Although the right to vote is a fundamental right, constitutional challenges to election laws are not necessarily reviewed under strict scrutiny. *See Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059, 119 L Ed 2d 245 (1992). Under the Michigan and the United States Constitutions a two-step analysis is required to determine whether or not to apply strict scrutiny to state election laws. *Id.* at 433. The Supreme Court has recognized that “[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections.” *Id.* As articulated in *Anderson*, the “more flexible standard” that a court must then apply requires a court to “weigh ‘the character and magnitude of the asserted injury to the rights protected by the . . . Fourteenth Amendment [.]’ ” and to weigh this interest “against ‘the precise interest put forward by the State as justifications for the burden imposed by its law,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’ ” *Id.* at 434 (quoting *Anderson, supra* at 789). If the restrictions on voters’ rights under the Fourteenth Amendment are “severe,” the Court will apply strict scrutiny. *Id.* If the burdens are not severe, the Court will assess whether the challenged regulation imposes “ ‘reasonable, nondiscriminatory restrictions.’ ” *Id.* (quoting *Anderson, supra* at 788). In *Burdick*, the Court held that Hawaii’s qualifications for those seeking candidates seeking a place on the ballot were not unreasonable. *Id.* at 434-35.

Although this latter standard may be more deferential to legislative judgments about time, place, and manner restrictions than strict scrutiny would be, courts will not let a burdensome voting regulation stand merely because the regulation is rational. *See generally Stewart v Blackwell*, 444 F3d 843, 872 (CA 6, 2006). In *Stewart*, the Court of Appeals for the Sixth Circuit recently held that certain Ohio counties' use of particular ballot technologies in some counties, while other counties used better and more reliable technology, violated the Equal Protection Clause of the Fourteenth Amendment under both strict scrutiny and the reasonable and nondiscriminatory standards of review. *Id.* at 876-77. The Court distinguished *Stewart* from *Burdick*, where the Supreme Court had found the regulation reasonable, because the Supreme Court "viewed the burden in *Burdick* as little more than a minor burden on those who waited until the 'eleventh hour' to decide whom to vote for or the interest in recording a 'protest vote.' " *Id.* at 861 (citation omitted). Unreasonable regulations would not be saved, moreover, where, as there, "the State's proffered justifications are belied by the actual facts of the case or are simply arbitrary justifications." *Id.* at 872.

Unlike the statute upheld in *Burdick*, Michigan's amended Section 168.523 does not discriminate against the eleventh hour voters. To reiterate Attorney General Kelley's analysis, its victims are "the poor, those who do not drive, especially the elderly, the handicapped and those who, for whatever reason, do not possess a picture identification card." OAG, 1997, No 6930 (Jan. 29, 1997). The burdens they face are substantial, as discussed *supra*, and the legislature's justifications, like those in *Stewart*, are at best ignorant of the facts on the ground, and at worst "simply arbitrary." The very stated purpose of the amendment is to target impersonation voter fraud, but the legislature adduced no evidence of even any allegations of such fraud. Moreover, any alleged problems of voter fraud were already addressed by several other provisions that had already been successfully

implemented. *See id.* (“Michigan has numerous statutory provisions in place to protect the integrity of the election process and to protect against voter fraud.”). The U.S. Supreme Court adopted the “reasonableness” standard in *Burdick* out of recognition that “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Storer v Brown*, 415 US 724, 730; 94 S Ct 1274; 39 L Ed 2d 714 (1974), *quoted in Burdick, supra* at 433. The facts here demonstrate that the photo-ID requirements of Section 168.523 compromise this view of how elections ought to proceed.

## CONCLUSION

For these reasons, *amici* respectfully request that the Court find the photo-ID requirements of 2005 PA 71, MCL 168.523, on their face, in violation of the Michigan and the United States Constitutions.

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